Supreme Court, U.S.
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No. 02-0371

IN THE

# Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

*Petitioner,*

*v.*

KEVIN LAMONT HICKS,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA

## BRIEF OF AMICUS CURIAE WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., IN SUPPORT OF RESPONDENT

PAUL D. POLIDORO
*Counsel of Record*
PHILIP BRUMLEY
LEGAL DEPARTMENT
WATCHTOWER BIBLE AND TRACT
SOCIETY OF NEW YORK, INC.
100 Watchtower Drive
Patterson, NY 12563
(845) 306-1000

*Attorneys for Amicus Curiae*

180090

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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## INTEREST OF AMICUS CURIAE

With the consent of the parties, Watchtower Bible and Tract Society of New York, Inc., submits this brief *amicus curiae* in support of Respondent.[1] The letters of consent are being submitted herewith.

The Watchtower Bible and Tract Society of New York, Inc., is a not-for-profit corporation used by Jehovah's Witnesses to print Bibles and Bible-based literature. There are over six million active Jehovah's Witnesses organized into over 94,600 congregations worldwide. In the United States, more than one million Jehovah's Witnesses worship in over 11,000 congregations. Jehovah's Witnesses consider it part of their individual responsibility before Jehovah God to follow Jesus' example and obey his command to go from house to house to speak to people about the Kingdom of God. As part of their public ministry, individual Jehovah's Witnesses "offer religious literature without cost to anyone interested in reading it." *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, __, 122 S. Ct. 2080, 2083 (2002). From September 2001 to August 2002, Jehovah's Witnesses spent over 184 million hours in their Bible education work in the United States alone. Their public ministry includes visiting residents in public housing. The Court's decision in this case will significantly impact this aspect of Jehovah's Witnesses' ministry.

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1. Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authorized this brief in whole or in part and that no person or entity other than *Amicus*, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

It is not merely conjecture or speculation to conclude that the ability of Jehovah's Witnesses to share their Bible-based message with public housing residents will be adversely affected if the government's street-privatization scheme is upheld. Experiences from around the country prove that such schemes embolden public housing managers to act as censorial gatekeepers, enforcing 'No Trespassing' regulations against Jehovah's Witnesses who attempt to engage in religious discourse. Should the Court sanction the scheme, discourse that lies at the heart of the First Amendment could lawfully be prohibited at formerly quintessential loci of communications.

The well-established contours of the overbreadth doctrine clearly permit consideration of the impact that the government's street-privatization scheme would have on protected speech. In the face of real and substantial overbreadth, a court need not wait until harm befalls speech interests before considering whether a governmental policy is overly broad in its reach.

The First Amendment was designed as a bulwark against the government's ability to interfere with activities that lie at the heart of liberty. Included within that protected liberty are the freedoms to speak, to distribute literature, and to participate in the open exchange of ideas. Such freedoms are the lifeblood of a free and vibrant democracy. If, by the simple expedient of changing title to property immemorially held in public trust, the government can stop protected communicative activity on residential public streets—the quintessential loci of communication—and thereby strip its citizens of their First Amendment protections, then the government has been accorded a potent weapon, indeed.



## ARGUMENT

### I. The overbreadth doctrine is applicable because the street-privatization scheme permits protected speech to be muted.

#### a. The scheme's impact on Jehovah's Witnesses and others' freedom to disseminate information is both real and substantial.

Countrywide over the past few years, Jehovah's Witnesses attempting to engage in their public ministry have experienced interference from managers of public housing facilities. Local congregations of Jehovah's Witnesses have reported difficulties in speaking at public housing facilities from coast to coast: from Kent, Washington, to Trenton, New Jersey. Representative of the nature of the barriers to speech resulting from the 'No Trespassing' scheme is the experience of Jehovah's Witnesses in buildings supervised by the Housing Authority of the City of El Paso, Texas.

There are 59 congregations of Jehovah's Witnesses in and around the city of El Paso. For years the regulations of the Housing Authority of the City of El Paso[2] have prohibited members of those congregations from entering public housing complexes. The United States Court of Appeals for the Fifth Circuit found these regulations to be an unconstitutional burden on prohibited speech. *Vasquez v. Housing Authority of the City of El Paso*, 271 F.3d 198 (5th Cir. 2001), *vacated*

2. The El Paso Housing Authority is the 21st largest housing authority in the United States. *U.S. Dep't of Housing and Urban Development*, "In the Crossfire: The Impact of Gun Violence on Public Housing Communities," App. IV, p. 43 (2000).

*and reh'g en banc granted*, 289 F.3d 350 (5th Cir. 2002). As a result of the Fifth Circuit's decision, on February 6, 2002, by its counsel, the Housing Authority advised Jehovah's Witnesses that they could conduct their public ministry within El Paso's public housing complexes.

On April 19, 2002, the Fifth Circuit ordered *Vasquez* to be reheard *en banc*. Notice of the death of the appellant was filed on July 22, 2002. Oral argument was heard *en banc* on September 19, 2002. On September 23, 2002, the court of appeals denied the motion to substitute as a party the wife of the deceased remaining appellant (the administratrix of his estate) and dismissed the appeal.[3]

Jehovah's Witnesses attempted to conduct their public ministry in El Paso public housing. However, on December 12, 2002, at Kennedy Apartments (a public housing complex within the Housing Authority of the City of El Paso) they again encountered interference from the housing manager. At the direction of the manager, the police ordered the Witnesses to leave under threat of arrest.

Although anecdotal, the situation in El Paso well illustrates the actual difficulties Jehovah's Witnesses face nationwide in attempting to disseminate information in public housing facilities.

Logically, the street-privatization scheme's reach is not limited to the expressive activities of Jehovah's Witnesses.

3. This order is not published but can be found in the Petition for Certiorari, pages A1-A2, in *De La O v. Housing Authority, petition for cert. filed*, 71 U.S.L.W. 3578 (U.S. Dec. 19, 2002) (No. 02-1276).



Similar trespass schemes around the country have interfered with others' rights of speech and press, as the following examples demonstrate:

> Anthony Mark Daniel was arrested after posting a sign protesting America's involvement in the Persian Gulf War. Thereafter, he was twice arrested for distributing leaflets to Housing Authority residents. *Daniel v. City of Tampa*, 38 F.3d 546, 549 n.5, n.6 (11th Cir. 1994).

> Jesus De La O brought suit to protect "his constitutional right to receive oral and written presentations from political candidates or their representatives." *Vasquez*, 271 F.3d at 201. He was joined in that action by Roberto Vasquez, then a candidate for El Paso County Democratic Chair, who was seeking to distribute literature in a housing authority complex. *Id.* at 200.

Illustrating that residents who desire to receive information really exist is the lawsuit brought by William Walker, a tenant of Georgetown (MA) Housing Authority property. He brought suit to assert the rights of tenants "to receive information, and to determine for themselves whom they will receive as visitors." *Walker v. Georgetown Housing Authority*, 677 N.E.2d 1125, 1126 (Mass. 1997). While Mr. Walker was contesting a total ban on the dissemination of information, and not a 'No Trespassing' policy, his case shows the effect a 'No Trespassing' policy would have if all speakers were prohibited on formerly public streets within Housing Authority complexes.

It is clear that the overbreadth of the street privatization scheme is not only "real, but substantial as well." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Well over 1.7 million individuals reside in public housing. *U.S. Dep't of Housing and Urban Development* (updated January 9, 2002), *available at* www.hud.gov/offices/pih/systems/pic/50058/rcr/index.cfm. This is a population larger than 12 states and the District of Columbia. Further, the scheme could result in a total ban on the dissemination of information on public streets in public housing if all speakers are subject to the 'No Trespassing' policy. This is hardly insubstantial.

The government's policy puts at risk fundamental First Amendment rights, as it impinges the "hand distribution of religious tracts . . . an age-old form of missionary evangelism" on Housing Authority streets. *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, __, 122 S. Ct. 2080, 2087 (2002) *quoting Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943). It also impinges the "constitutional rights of . . . those desiring to receive" literature. *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943). Further, it eliminates the ability to contact residents of public housing units at their homes by denying access to public vestibules containing apartment buzzers or bells. Many public housing residents may be willing recipients of information. As this Court recognized in *Hill v. Colorado*, 530 U.S. 703 (2000), the protection of speech to a willing audience has a solid foundation. "Private citizens have always retained the power to decide for themselves what they wish to read, and within limits, what oral messages they want to consider." *Id.* at 734. If the government's scheme is upheld, a private citizen residing at Housing Authority property would no longer have the right, let alone the opportunity, to decide for himself whether to receive messages at his home.



**b. Mr. Hicks may properly assert the expressive rights of others not before the Court because the scheme creates an impermissible risk of the suppression of ideas.**

The government's street-privatization scheme is unconstitutionally overbroad because it restricts a substantial amount of constitutionally protected speech. Under the "overbreadth doctrine," Respondent may assert the interests of others not before the Court—in this instance, those desiring to engage in religious or political discourse.

Although Mr. Hicks did not participate in discourse, he may properly challenge the government's scheme as being unconstitutionally overbroad because it prohibits religious or political discourse absent Housing Authority permission.

> "[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their right for fear of criminal sanctions provided by a statute susceptible of application to protected expression."

*Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32, 38 (1999), *quoting Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972).

"[A] party [may] challenge an ordinance under the overbreadth doctrine in cases where . . . the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992). Since Richmond's scheme applies to, and may well deter, individuals who wish to engage in one-on-one religious or political communication on public streets, its existence "may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. at 612 (1973). Further, the risk of prosecution raises the "need to protect such speakers by allowing someone else to raise their challenges to the law." *Los Angeles Police Dep't*, 528 U.S. at 42 (Scalia, J., concurring). To assess the facial invalidity of the policy, Respondent may invoke the overbreadth doctrine. *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999).

Under the overbreadth doctrine, a party may challenge a policy "in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker." *Forsyth County*, 505 U.S. at 129. It is appropriate in an overbreadth challenge to consider the context within which a case arose:

> In evaluating respondent's facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it. In the present litigation, the county has made clear how it interprets and implements the ordinance.

*Id.* at 131 (citations omitted).



In like manner, it is appropriate to review the Housing Authority's policy regarding those desiring to engage in the dissemination of information. The Housing Authority has made it clear how it interprets its policy. As implemented and interpreted through the "unwritten policy," the housing manager decides who receives permission to disseminate literature. The scheme impermissibly grants the Housing Authority manager "overly broad licensing discretion." *Forsyth County*, 505 U.S. at 130.

Further, a speaker is subject to arrest if, after "having been duly notified . . . [he] stays upon or returns to Richmond Redevelopment and Housing Authority property." *Virginia v. Hicks*, 563 S.E.2d 674, 676 (Va. 2002). Such notification will be given if a "person cannot demonstrate a legitimate business . . . purpose for being on the premises." *Id.* The determination of legitimacy in the context of dissemination of information is also within the discretion of a police officer. *See Hicks v. Virginia*, 548 S.E.2d 249, 252 (Va. Ct. App. 2000) (*en banc*) ("The police officer makes the determination whether a person is to be barred, determines whether the person is a tenant or is there at the invitation of a tenant, or whether there is a legitimate reason for being on the property.").

If a speaker can get past the legitimacy determination of the police, she is still subject to the unfettered discretion of the housing manager. *Hicks*, 563 S.E.2d at 680-81. The overbreadth doctrine is designed to permit judicial review of such a policy in the face of the "possibility that protected speech will be muted." *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977).

Virginia contends that Mr. Hicks cannot raise these important issues because he was not involved in expressive conduct. However, this is precisely the situation the overbreadth doctrine is designed to address. It is an exception designed to safeguard the First Amendment interests of those not before the Court. If the rule of law permitted Mr. Hicks to raise overbreadth issues in his defense only if he were personally involved in the dissemination of information, an overly broad law would remain in place despite its obvious, real, and substantial impact on constitutionally protected speech interests.

## II. The government has no authority to prohibit the dissemination of ideas by privatizing public residential streets.

The government's privatization scheme is fatally flawed in that it ignores two centuries of zealous First Amendment protection for residential streets—traditional loci of communication.

The 'No Trespassing' scheme attempts to revoke public access to residential streets, fora that hold a special place in American jurisprudence:

> Wherever the title of streets . . . may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United



> States to use the streets . . . for communication of views on national questions may be regulated in the interest of all; . . . but it must not, in the guise of regulation, be abridged or denied.

*Hague v. CIO*, 307 U.S. 496, 515-16 (1939) (Roberts, J.).

These words of Justice Roberts are not some idealized version of a hoped-for Utopia. Rather, they articulate a principle embedded within the very fibers of First Amendment jurisprudence.

> In short, our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a "cliché." . . . No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.

*Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988). Relying upon the principles enunciated by Justice Roberts in *Hague*, in reference to public streets and sidewalks, the Court has held that "[i]n such places, which occupy a 'special position in terms of First Amendment protection,' the government's ability to restrict expressive activity 'is very limited.'" *Boos v. Barry*, 485 U.S. 312, 318 (1988) (citations omitted).

The government's privatization scheme ignores the special position that residential streets and sidewalks serve as part of the marketplace of ideas. In destroying access to this quintessential public loci, the government theorizes that as a landlord, it can act as it wills with respect to its property. This supposition has no support in law.

This is not the first governmental attempt to regulate activity on residential streets. The city in *Hague* advanced an argument similar to Petitioner's. In *Hague*, the city contended that its

> ownership of streets and parks is as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof, or unless, though the city holds the streets in trust for public use, the absolute denial of their use . . . is a valid exercise of police power.

*Hague*, 307 U.S. at 514. Thereafter, the Court consistently rejected governmental attempts to circumvent the public's right of access to residential streets for expressive purposes. *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Tucker v. Texas*, 326 U.S. 517 (1946); *Frisby v. Schultz*, 487 U.S. 474 (1988).

In support of its proposition that it can act in a different manner as a landlord than it can as a sovereign with respect to residential streets, Petitioner relies mainly on *Department of Housing and Urban Development v. Rucker*, 122 S. Ct. 1230 (2002). While *Rucker* gives the government the authority as landlord to enforce the contractual terms of a lease against its tenants, it surely does not give the government *carte blanche* to regulate the constitutional rights of its tenants, let alone the constitutional rights of third parties.

> The government is not attempting to criminally punish or civilly regulate respondents as members of the general populace. It is instead acting as a landlord of property that it owns, involving a clause in a lease to which respondents have agreed and which Congress has expressly required.



*Rucker*, 122 S. Ct. at 1236. In the present case, the government attempts to regulate its tenants as though they were members of the general populace as well as individuals who actually are members of the general populace. This it cannot do.

Constitutional jurisprudence does not support the government's privatization scheme. It was impermissible for the city of Macon to appoint private trustees and avoid constitutional safeguards as to the administration of a public park. *Evans v. Newton*, 382 U.S. 296 (1966). It was impermissible for the state of North Carolina to contract with private physicians and avoid its constitutional duty to provide adequate medical treatment to prison inmates. *West v. Atkins*, 487 U.S. 42 (1988). It was impermissible for the federal government to create a private corporation and avoid its constitutional duty to abide by the First Amendment. *Lebron v. Nat'l Railroad Passenger Corp.*, 513 U.S. 374 (1995). Similarly, it must be impermissible for a political subdivision of the Commonwealth of Virginia, the Richmond Redevelopment and Housing Authority, to privatize property held in public trust and avoid its constitutional duty to abide by the First Amendment.

The Court has long protected the public status of streets. "Congress, no more than a suburban township, may not by its own *ipse dixit* destroy the 'public forum' status of streets . . . which have historically been public forums." *U.S. Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981). "Nor may the government transform the character of the property by the expedient of including it within the statutory definition

of what might be considered a non-public forum parcel of property." *United States v. Grace*, 461 U.S. 171, 180 (1983). And it is residential streets that is our focus. Contrary to the contention of Petitioner and its *amici*, there is no claim for access to speak in public schools, public libraries, or courthouses. Such are not, and never have been, quintessential loci of communications. Nor is access being sought to disseminate information on military installations, which were never traditional places "for free public assembly and communication of thoughts by private citizens." *Greer v. Spock*, 424 U.S. 828, 838 (1976).

We are not oblivious to the effects of crime on residents of public housing complexes. But the scheme in question does not focus on those committing crimes. *Cf. City of Bremerton v. Widell*, 51 P.3d 733, 735 (Wa. 2002) *en banc* ("This policy allows the revocation of a nonresident's license to be on the common areas of the premises if the nonresident is found engaging in specified criminal and offensive conduct."). Rather, it impermissibly impacts residents who are entitled to decide to receive messages of comfort and hope, and those who wish to enter these complexes to communicate such messages. Here, the scheme draws "no distinction between innocent conduct and conduct calculated to cause harm." *City of Chicago v. Morales*, 527 U.S. 41, 50-51 (1999). It should.

There is no evidence that the government changed the nature of the streets with the intent to thwart expressive activity. Also, logic dictates that it intended (at the time of building the housing units) to create public residential streets. Otherwise, there would be no need for it to "transfer" ownership as part of the street-privatization scheme. In any



event, the issue of its intent is irrelevant in adjudicating the rights of those who wish to disseminate, or receive, information in public housing. "In summary, traditional public fora are open for expressive activity regardless of the government's intent. The objective characteristics of these properties require the government to accommodate private speakers." *Arkansas Educ. Television Comm. v. Forbes*, 523 U.S. 666, 678 (1998).

It is the nature of the streets (residential) that drives the analysis in this case. Individuals who live in residential neighborhoods with white picket fences and green lawns surrounding red-roofed homes have the unfettered rights to receive information whether on the street or at their door. Residents of public housing should not be treated any differently. They, too, should have the right to receive information on their residential streets. Speakers, too, should have the right to ring a resident's buzzer or bell in the public lobby of residential buildings. Those "good, decent people who must struggle to overcome their desperate situation, against all odds, in order to raise their families, earn a living, and remain good citizens" (*City of Chicago v. Morales*, 527 U.S. 41, 115 (Thomas, J., dissenting)) should not be treated as less than full recipients of the rights that lie "at the foundation of free government by free men." *Schneider v. New Jersey*, 308 U.S. at 161 (1939).

## CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Virginia should be affirmed.

Respectfully submitted,

PAUL D. POLIDORO
*Counsel of Record*
PHILIP BRUMLEY
LEGAL DEPARTMENT
WATCHTOWER BIBLE AND TRACT
SOCIETY OF NEW YORK, INC.
100 Watchtower Drive
Patterson, NY 12563
(845) 306-1000

*Attorneys for Amicus Curiae*